JAN 2 9 2005

No. 04-829

IN THE
Supreme Court of the United States

JEFFREY R. GOLIN AND ELSIE Y. GOLIN
ON BEHALF OF THEMSELVES
AND AS NEXT FRIENDS FOR DAUGHTER
NANCY K. GOLIN,
Petitioners

v.

CLIFFORD B. ALLENBY, DIRECTOR
DEPARTMENT OF DEVELOPMENTAL SERVICES,
STATE OF CALIFORNIA
AND
SUPERIOR COURT OF SANTA CLARA COUNTY,
Respondents

On Petition for Writ of Certiorari
To The Supreme Court of the State of California

SUPPLEMENTAL BRIEF

JEFFREY R. GOLIN
ELSIE Y. GOLIN
PRO SE PARENT-PETITIONERS
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(650) 814-6284

QUESTIONS PRESENTED

1. Whether *Gault*[1]-*Winship*[2] Sixth Amendment criminal due process guarantees in nominally civil commitment proceedings extend revitalized confrontation clause rules to civil commitment matters following *Crawford*[3].
2. Whether *Crawford* extends confrontation rights coverage abrogating hearsay exception rules to dubious types of business records that *are* clearly testimonial by their nature.
3. Whether *Teague*[4] retroactivity applies to the new procedural rule of *Crawford*, either as a "new watershed rule" or in a live case.

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[1] *In re Gault* 387 U.S. 1 (1967)
[2] *In re Winship*, 397 U.S. 358 (1970)
[3] *Crawford v. Washington, 541 U.S. 36 (2004)*
[4] *Teague v. Lane*, 489 U.S. 288 (1989)

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitutional Amendment VI:

> **In all criminal prosecutions, the accused shall enjoy the right to** *a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to* ***be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor****, and to have the Assistance of Counsel for his defence.*

OPINIONS AND ORDERS BELOW

The following new orders are included in the appendix.

December 29, 2004: December 29, 2004: Order of California Sixth Appellate District denying motion to vacate dismissal of appeal. (H026861) (App., *infra* 1a)

December 2, 2004: Order of California Sixth Appellate District [denying motion to extend time to complete procurement of trial transcripts, resultant failure to file opening brief] dismissing appeal (H026861) (App., *infra* 2a)

July 8, 2004. Order of California Sixth Appellate District granting motion to vacate dismissal and reinstating appeal to active status; [appellants now required to procure trial transcripts at own expense despite indigency] (H026861) (App., *infra* 3a)

These decisions are all unreported.

NEW CASES AND INTERVENING MATTER

A. State Appeals Court Dismisses Conservatorship Appeal After Denial of Record for Opening Brief

As of the date Petitioners' Original Petition for Certiorari was filed here on May 27, 2004, a state appeal was still pending in the California Sixth District Court of Appeals, from a grant of involuntary limited conservatorship to the State of California *In re Nancy Golin* denying her parents' competing petition to conserve their adult merely retarded daughter and appealing the adverse and unsupported findings of a state court trial, Hon. William F. Martin, presiding.

The instant Petition before this Court appealed in part from a denial of a Writ of Mandate from the California Supreme Court denying a grant of review of the denial of the Sixth District of our motion to provide transcripts of the oral proceedings of the trial court. The oral trial record was crucial to any appeal. The appeals court had twice denied petitioners' motions to provide the trial transcripts on appeal (3/4/04, 6/8/04), (contravening this Court's holding in *M.L.B. v S.L.J.*, 519 U.S. 102 (1996)). Grounds cited were petitioners' lack of funds to pay for them despite having been granted leave to proceed *in forma pauperis* on February 6, 2004, resulting from hardship from three years of undue burden from litigation. The appeals court directed petitioners to pay for the transcripts or proceed without them. It twice noticed a default for failure to procure them.

Petitioners in June 2004 secured the gracious assistance of appellate attorney William Gilg who moved to vacate a June 8, 2004 dismissal. It was granted August 8, 2004 (App., *infra* a3), on condition that the parents would pay for the transcripts themselves, despite the hardship. Mr. Gilg stated from experience it would be useless to appeal without transcripts. Mr. Gilg indicated to the state appellate court that the single reason that they had not filed a brief was the lack of access to an affordable transcript of the oral record of the proceedings. Mr. Gilg donated the bulk of his time, deferring payment to a later date so that the petitioners could concentrate first on paying for transcripts. Court of Appeals timelines do not wait for financial recovery.

In November, parent-petitioners began to recover and to obtain partial transcripts from the trial court reporter. One third of the transcripts were procured and now are available to be excerpted (App., *infra*, 1b). Mr. Gilg requested an extension of time from the Court of Appeals explaining petitioners' financial circumstances, to complete the procurement of the necessary transcripts with an extension to file an opening brief based on those transcripts. On December 2, 2004, this motion for extension was denied (App., *infra* 1a), and the appeal was dismissed, styled as a dismissal for failure to file an opening brief. A new motion to vacate dismissal was filed by Mr. Gilg on December 24, 2004 requesting a shorter extension of time, but this was also denied on December 29, 2004 (App., *infra* 2a).

Therefore, petitioners' appeal has now been dismissed as anticipated in the original petition for one reason: hardship caused by litigation and resulting inability to timely pay for complete trial transcripts making it impossible for their attorney to file an opening brief, fully ripening this petition.

B. New Rule of *Crawford*[5] Retroactively Denies Admission of Testimonial Evidence Relied On to Reach Adverse Findings in Trial Court Opinion

In May 2004, as the appeal from the October 17, 2003 Martin decision was still proceeding in state appeals court, this Court revitalized the Confrontation Clause of the Sixth Amendment in *Crawford v. Washington*, 541 U.S. 36 (2004). In light of *Crawford*, we have a new procedural rule that is material and relevant to Nancy Golin's conservatorship trial.

A critical reading of the Martin opinion (App., *Orig. Pet.* 14a-31a) discloses that essentially his entire opinion, including statements concerning the parent's interactions with doctors, or doctors' speculative opinions about the parents supposed inability to administer medications (*Id.*, 23a–24a), rests on out of court testimonial evidence admitted under a business records

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[5] See, "*Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection, Crawford v. Washington,* " Criminal Justice Summer, 2004 Feature, Richard D. Friedman, 19 SUM CRIM JUST 4, and "*Hearsay and the Confrontation Clause*", 77-MAY Wis. Law. ,16, Wisconsin Lawyer, May 2004. Steven M. Biskupic, 77-MAY Wis. Law. 16

exception to the hearsay rule, Cal. Evid. Code §1270. This rule was underpinned by presumed reliability rule of the previous Supreme Court holding in *Ohio v. Roberts*, 448 U.S. 56 (1980) abrogated by *Crawford*, applied to civil commitment proceedings. Martin inconsistently uses adverse testimonial evidence to trump and ignore favorable live testimony, using hearsay by doctors, psychologists, psychiatrists, social workers and protective service workers who never testified, in medical or other records. That approach was specifically rejected in *Crawford:* "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." (*Crawford*, 124 S.Ct. at 1370)

The most prominent instance of this in Martin's opinion is ER Dr. Mark Bason-Mitchell's emergency room records criticizing the parents cited at length in Martin's decision reaching conclusions diametrically opposite to that of live witness Dr. Jerold Kaplan, who knew the family for nine years, unlike Bason-Mitchell. Bason-Mitchell could not qualify as an expert witness on psychotropics if he had appeared. His statement is undoubtedly "testimonial" under the *Crawford* standard. The State made no effort to call Bason-Mitchell to testify or show he was unavailable, nor was there a previous opportunity to cross-examine him. Martin accepted Bason-Mitchell's ER notes under the Cal. EC §1270 rule as presumed to be reliable, stating that it was *"not a legal objection [but] really argument as to the weight of the evidence*" (App., *infra* 5b). Martin overruled Mr. Golin's objections to the introduction of this evidence on October 8, 2003, saying (App., *infra* 6b):

> *"I will admit Exhibit 22 for several reasons. First of all, they're authenticated by the custodian of records and they look like business records...."*

Then Martin extensively cites Bason-Mitchell's written report for almost two pages in his opinion to purport that the parents are "uninformed" on the subject of psychotropic medications[6] to trump live evidence that such medications can be

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[6] Citing Martin's opinion quoting Bason-Mitchell's November 7, 2002 testimonial ER notes at length (App., *Orig. Pet* 22a-23a) "*The mother, father and the friend are all extremely concerned about the patient and the concept of the patient being withdrawn from trazodone and Risperdal. I have done*

(cont'd next page)

very dangerous given by expert psychiatric witness Dr. Hector Cerezo, SARC's own psychiatrist that prescribed Risperdal for Nancy based on misrepresentations by her state caregivers. Dr. Cerezo did appear as a cooperative witness, was qualified by the Court as an expert, and was cross examined on October 8, 2003, saying (App., *infra*, 3b)

> *A: (Cerezo) If we have to stop the medication and doesn't (sic) plan to replace it with another medication, we have to taper it off.*

And later Cerezo testified "*It can lower seizure threshold*" (App., *infra* 2a) stating that it was contraindicated for persons like Nancy having a pre-existing seizure condition and therefore, contrary to Bason-Mitchell's hospital records, dangerous. The Court itself (Martin) asked Cerezo what to do about tapering off these drugs, and Cerezo confirmed that it was necessary to slowly withdraw them (App., *infra* 2b-3b) contrary to Bason-Mitchell's hospital notes. Cerezo responded, if these drugs were not discontinued when such side effects as observed by the parents were seen, it could cause *death* (App., *infra* 4b).

Martin never even acknowledges live expert witness Dr. Cerezo or his name anywhere in his opinion, as if he never appeared, only the testimonial evidence of non-expert ER doctor Bason-Mitchell. Cerezo's testimony proved the parents were far from being hysterical, uninformed alarmists or troublemakers when they saw their daughter freezing up and showing unmistakable signs of tardive dyskinesia from state drugging. In fact, what concerned parent wouldn't be panicky after discovering their child had suffered painful, permanent untreated orthopedic and neurological injuries in unsupervised state care, with a doctor whose uninformed decisions meant that she would be forced to go back that night to the same facility where those injuries had occurred, with no way to stop it?

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my best, with lengthy conversations, and in nonmedical plain English, to explain to them that there is no acute withdrawal from Risperdal or trazodone. They refused to believe me, so I have also called the patient's primary care physician, Dr. Masada ...he assured me that his interaction with the family has been somewhat concerning, in that he has called the companies that produce these two medications and they feel that there is no acute withdrawal syndrome related to withdrawal of these medications."

Bason-Mitchell's testimonial evidence is unreliable hearsay that was itself a conduit for further removed hearsay, the telephone opinion of primary care Dr. Masada, who Bason-Mitchell relied on for the erroneous information that Nancy had been on psychotropics for only a month, whereas in fact we know from Cerezo and Stanford she had been medicated this way for one year at the discretion of her state caregivers. General practitioner Dr. Masada assigned by SARC, who had been Nancy's primary care doctor for only one week when Bason-Mitchell's ER referenee occurred, did not appear to testify either, and he also would not have passed qualification as an expert witness on either neurology or psychiatry, although he prescribed the psychotropics for Nancy after October, 2002.

Dr. Bason-Mitchell's live testimony was needed to explain why in one part of ER note cited by Martin (App., *Orig. Pet.* 20a) to trump live orthopedic expert witnesses Nguyen and Kaplan's assessment, based on one x-ray view where Bason-Mitchell did not find the dislocated shoulder whereas in another part he found it based on another view, which Martin cited that perhaps Nancy's shoulder wasn't dislocated. Board certified expert orthopedist Nguyen who also testified was disparaged because Martin thought he should have deferred to non-expert Bason-Mitchell's notes (App., *Orig. Pet.* 19a) though Nguyen also examined Nancy and the x-rays of the clearly visible dislocated shoulder[7]. Bason-Mitchell worked Nancy's shoulder back into its socket in the ER per his later note.

Martin proceeds to discredit the ripped off fingernail incident (*Id.*, at 20a). Dr. Morgan who examined it actually testified that the nail looked as if it *was* ripped off as suspected, but Martin concludes from an *earlier* Stanford *record* that it was not. Martin simply struck live expert medical testimony from Dr. Morgan, or prevented other testimony from being heard after a valid offer of proof (*Id.*, at 21a) concerning her grave esophageal injuries in state care that resulted from drugging.

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[7]Citing Martin's opinion (*Id.*, at 20a) "*Apparently [Nguyen] did not review the emergency room note by Dr. Mark Bason-Mitchell, Exhibit 22, who noted [shoulder condition at ER before and after manipulation]. Thus, apparently, Dr. Nguyen was not given all the information needed to fully inform him as to the condition of Nancy Golin's left shoulder*".

Dr. Kaplan was qualified by the trial court as a board-certified expert in orthopedic surgery and abuse. Yet, he was disparaged by Judge Martin as a mere "plastic surgeon" (*Id.*, at 19a) and his live testimony discounted in favor of non-appearing ER doctor Bason-Mitchell's exam notes (*Id.*, at 20a). Dr. Kaplan, though having cared for Nancy's neurological needs during past hospitalizations and examinations, was disregarded as to her seizure medications (App., *infra* 9b). He testified that the parents had no problem in dealing with him as Nancy's physician and saw no concern that would disqualify them from conserving her (App., *infra* 9b-10b).

Similarly, the Stanford hospital records of psych doctor Chris Hayward should be barred by *Crawford*. Hayward had never met the parents and had no direct knowledge whatever other than what he was told by the police, lacked any certification as an expert in neurology and did not appear for cross-examination, yet his speculative hospital records were a conduit for hearsay ["*apparently, the mother believed that the doctors did not know how to dose the Phenobarbital for Nancy, and therefore took matters into her own hands*" (App., *Orig. Pet.* 23a)] weighed more heavily by Martin than actual first hand neurological witnesses, Dr. Kaplan who reviewed the medical records, or records from neurology consultations.

In fact, seizures on November 15, 2001 proved Hayward *actually did not* know how to dose Nancy's Phenobarbital, but Mrs. Golin, acting on her neurologists' instructions, *did* and in fact *was* "smarter" than him in this instance. Indeed, in SARC care as of now, we know Nancy Golin's seizures are still not controlled. Visits with her parents are cut off for months without explanation to hide grave illnesses, and records that would prove this are concealed by her caregivers. Yet, Martin finds citing this "*impact on Nancy Golins medical care*" (*Id.*, at 22a), due to "*the Golins' mistaken overconfidence in their limited medical knowledge combined with their erroneous belief that they are smarter than others*" (*Id.*, at 24a).

Martin's opinion continues a litany of similar wildly speculative complaints based on testimonial hearsay evidence that could not possibly have stood up to cross-examination. These frivolous and overblown reports were invariably made under

strong pressure from SARC's attorneys but never confirmed in cross-examination. Dr. Gaskins did *not* call security on March 10, 2003 (*Id.*, at 23a), but merely threatened it without cause when ordered by SARC to stop talking to the parents for medical background and history. Mr. & Mrs. Golin *did* call police and paramedics to Embee RCF in March 2003 (*Id.*, at 23a) for a welfare check when in fact it turned out later as rumored that Nancy was in the hospital in critical condition[8] while SARC and Street were stonewalling all information. Martin's erroneous findings are a "*self-contained demonstration of Roberts' unpredictable and inconsistent application*" (*Crawford*, 124 U.S., at 1355) of rules of indicia of presumed reliability.

SARC's psychology expert witness Mulhoe similarly relied heavily on *20-year old* unreliable unsworn testimonial evidence provided by SARC of social workers and teachers in reaching her conclusions, and she had never even met the parents or evaluated their relationship with their daughter.

Martin's wildly speculative "finding", "*Armed with this information, they are unafraid to medicate Nancy Golin according to their own beliefs despite physician's orders to the contrary*," (*Id.*, at 24a) was never supported by testimony of the parents doing any such thing, or evidence of it, except third hand speculative hearsay from raw interns and nurses found in APS and hospital records, no better than gossip. Here, Martin is actually *complaining* that the parents informed themselves about drug side effects and were involved in their daughter's care. This is at best an old-fashioned attitude that should hardly disparage the parents' abilities as caregivers. Dr. Kaplan, who reviewed the medical records and testified, stated that the parents asked questions but always followed their doctor's orders after being explained (App, *infra* 8b) yet Martin either ignored his testimony or discounted it using hospital records that should be excluded under *Crawford*.

Martin cites APS testimonial records twice ("tainted salmon" and "rubbing alcohol" (App., *Orig. Pet.* 27a)) to counter

[8] Embee caregivers identified a different girl as Nancy to police when they arrived to dupe them into believing that Nancy was okay and the parents were merely being hysterical and disruptive, whereas she was only a few hours earlier rushed by ambulance to San Jose Medical Center.

the parents' live testimony of actually a beautiful demonstration of maternal overcautiousness. SARC psychologist Mulhoe relied heavily on APS records, as the State quietly scuttled their lead witness Santa Clara County APS Head Buckmaster.

ARGUMENT

I. *CRAWFORD* CONFRONTATION RULES APPLY TO CIVIL COMMITMENT PROCEEDINGS

Crawford rules apply to Sixth Amendment Confrontation Clause rights of criminal defendants. The conservatorship trial was not nominally a criminal case. This was a civil trial on the involuntary commitment of Nancy Golin facing what would undoubtedly become an unjust life sentence in neglectful and abusive state custody rather than liberty at home with her beloved family, where her personal liberty is inextricably intertwined with her parents' proven ability to care for her.

This Court has long held the rights of persons facing possible permanent loss of their liberty in civil proceedings are indistinguishable from defendants in a criminal proceeding, sufficient to trigger Sixth Amendment due process rights. (*In re Gault* 387 U.S. 1 (1967) *["...commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called 'criminal' or 'civil'"]* (*Id.*, at 50) and *In re Winship*, 397 U.S. 358 (1970)) *["civil labels and good intentions do not themselves obviate the need for criminal due process safeguards"]* (*Id.*, at 365-366) States including California have followed this holding (see, *Conservatorship of Roulet*, 152 Cal.Rptr. 425, 427-428 (1979), *People v. Thomas*, 566 P.2d 228, 232 (1977)). However, this Court has not reached the question of whether *Crawford* confrontation coverage extends to nominally civil commitment proceedings in light of past *Gault* and *Winship* decisions.

Lower courts are in conflict on whether to extend *Crawford* civil commitment proceedings. A few courts since *Crawford* favorably discussed but declined to so extend, (See *In re Commitment of G.G.N.*, 855 A.2d 569 (2004), *Civil Commitment of E.S.T.*, 371 N.J.Super. 562, *In re Civil Commitment of A.X.D.*, 370 *N.J.Super.* 198 (2004)). The Supreme Judicial Court of Massachusetts specifically declined to extend *Crawford* to one type of civil commitment matter (SVP) in *Com-*

monwealth v. Given, 808 N.E.2d 788 (2004), *cert denied, Given v. Mass.*, 125 S. Ct. 366 (2004). As the dissenters in *Commonwealth v. Given* said (Ireland, J.) *(Id., at 796)*:

> *"[a]lthough the holding in the Crawford case in inapplicable here because the proceeding was civil rather than criminal, it is the Court's reasoning regarding the reliability of out-of-court statements that applies in this context...."*

II. MANY TYPES OF BUSINESS RECORDS ARE CLEARLY OF DUBIOUS RELIABILITY AND SHOULD BE EXTENDED *CRAWFORD* COVERAGE

This Court's majority in *Crawford* thought it was important to mention that hearsay exceptions such as the ones founded upon business records were historically of the "firmly rooted" type deemed reliable by the exclusion rule, asserting:

> *"Most of the hearsay exceptions covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy."* (Crawford, *124 S.Ct. at 1367).*

Much hearsay is plainly of dubious trustworthiness even though it fits within a "firmly rooted" exception. Exempting business records as a broad category from *Crawford* coverage provides gaping loopholes for unreliable evidence to fly under the radar of the confrontation clause, sapping *Crawford* and the Sixth Amendment of their vitality. Historical analysis forgets that the rubric of "business records" has expanded in modern times to encompass far more than routine quill and ink accounting ledgers as it did centuries ago when it first became "firmly rooted", like extrapolating from buggy whips to space ships. Some routine business records *may be* testimonial "by their nature", yet clearly the *hospital records* of unsworn non-*exparte* statements of non-expert physicians or specialists, unlicensed interns, nurses, social workers, protection advocates, or psychiatric reports often include purely speculative opinion or hearsay or provide conduits for hearsay.

Protective services records are known by research to be a notoriously unreliable form of business record[9]. Few checks on

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[9] See, *"Elusive Innocence: Survival Guide for the Falsely Accused"* by Dean Tong, Alpha Publishing, 2002.

anonymous, frivolous or malicious reports exist. Results vary from the critics' eight out of nine[10] to the current official figure of over 60%[11] of protective agency reports that are shown to be unfounded, unsubstantiated or false after cursory investigation. Investigations screening such reports were discovered here never to result in notations to the file indicating that they were shown to be unfounded, but were left to fester in the record just as they were originally reported. CPS/APS records are the quintessential example of why business records may not be broadly deemed non-testimonial by their nature as "firmly rooted" exceptions to hearsay without doing violence to the framers' plan and the sound reasoning of *Crawford*.

III. RETROACTIVITY SHOULD APPLY TO *CRAWFORD* RULES IN THIS LIVE CASE

Retroactivity should apply here now under the criteria of *Teague v. Lane*, 489 U.S. 288 (1989) to this "live case" which was still on appeal in state court when this petition was filed. Some circuit courts have strained to show that *Crawford* is *not* a watershed rule of criminal procedure subject to retroactive application under exception to general non-retroactivity of *Teague* rule.

CONCLUSION

For the foregoing additional reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

_____, _____

Jeffrey R. Golin Elsie Y. Golin

Dated, January 24, 2005

13736 De Leon Ave.,

Santa Nella, CA 95322

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[10] See, "*False Allegations, What the Data Really Show*", and "*Introduction: How the War Against Child Abuse Became a War Against Children*", *National Coalition for Child Protection Reform*, available online at http://www.nccpr.org

[11] See "*Testimony Regarding False Allegations Before the Select Committee on Children, Youth and Families*", by Douglas J. Besharov, November 28, 2004, and "*Testimony before the New York State Senate Majority Task Force on Children's Health and Safety*", March 3, 2004, Presented by Karen Schimke, President and CEO, Schuyler Center for Analysis and Advocacy.

APPENDIX A

New Opinions and Orders Below

Page	Attachment
1a	December 29, 2004: Order of California Sixth Appellate District denying motion to vacate dismissal of appeal. (H026861)
2a	December 2, 2004: Order of California Sixth Appellate District [denying motion to extend time to procure remainder of trial transcripts, and consequent failure to file opening brief] dismissing appeal (H026861)
3a	July 8, 2004. Order of California Sixth Appellate District granting motion to vacate dismissal and reinstating appeal to active status; [appellants now required to procure trial transcripts at own expense despite indigence] (H026861) (H026861)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

FILED
DEC 29 - 2004
Court of Appeal – Sixth App. Dist.
By_____
Deputy

DEPARTMENT OF DEVELOPMENTAL SERVICES,
Petitioner and Respondent,
v.
JEFFREY GOLIN, et al,
Objectors and Appellants

No., H026861
(Super. Ct. No. PR151096)
Santa Clara County

BY THE COURT:

Appellants motion for relief from dismissal is denied.

Date: DEC 29 - 2004 s/ RUSHING, P.J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

FILED
JUL 8 - 2004
Court of Appeal – Sixth App. Dist.
By_____
Deputy

In re the CONSERVATORSHIP OF THE PERSON OF NANCY GOLIN,

DEPARTMENT OF DEVELOPMENTAL SERVICES,
Petitioner and Respondent,
v.
JEFFREY GOLIN, et al,
Objectors and Appellants

No., H026861
(Super. Ct. No. PR151096)
Santa Clara County

BY THE COURT:

Appellants' motion to vacate dismissal order filed on June 8, 2004, is granted. The appeal is ordered restored to active status.

Appellants' request for extension of time to prepare trial record is granted.

The trial record shall be filed 60 days from the date of this order.

RECEIVED
AUG 05 2004
KIRI TORRE
Chief Executive Officer/Clerk
Superior Court of California/County of Santa Clara
BY s/J. Nelson, DEPUTY

Date: JUL 8 - 2004 s/ Conrad Rushing, P.J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

FILED
DEC 2 - 2004
Court of Appeal – Sixth App. Dist.
By_____
Deputy

In re the CONSERVATORSHIP OF THE PERSON OF NANCY GOLIN, DEPARTMENT OF DEVELOPMENTAL SERVICES, Petitioner and Respondent, v. JEFFREY GOLIN, et al, Objectors and Appellants	No., H026861 (Super. Ct. No. PR151096) Santa Clara County

BY THE COURT:

The appellant having failed to file a brief after notice given under Rule 17(a), California Rules of Court, the appeal is dismissed

Date: DEC 2 - 2004 s/ RUSHING, P.J.

APPENDIX B

[Previously Unavailable]
Excerpts of Partial Record,
(USSC Rule 14(1)(i)(vi))

1b October 8, 2003, Excerpts of Santa Clara County Superior Court Probate Division, court reporter Rose Reummler's partial transcripts of oral record of conservatorship trial, direct and redirect examination of Dr. Hector Cerezo, psychiatrist (1-02-PR-151096)

7b October 7, 2003, Excerpts of Santa Clara County Superior Court Probate Division, court reporter Rose Reummler's partial transcripts of oral record of conservatorship trial, direct examination or Dr. Jerold Kaplan, orthopedics and surgery (1-02-PR-151096)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
DEPARTMENT 15 WILLIAM F. MARTIN, JUDGE

IN RE: CONSERVATORSHIP OF NANCY GOLIN

CASE NO.: 1-02-PR-151096
SAN JOSE, CA.; OCTOBER 8, 2003; A.M. SES-

REPORTER'S TRANSCRIPT
OF
TESTIMONY AND PROCEEDINGS

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FOR DEPARTMENT OF DEVELOPMENTAL SERVICES FOR SAN ANDREAS REGIONAL CENTER	STATE OF CALIFORNIA BY: H. DEAN STILES SENIOR STAFF COUNSEL BERLINER-COHEN BY: NANCY J. JOHNSON ATTORNEY AT LAW
IN PROPRIA PERSONA	GEORGIANNA LAMB
IN PROPRIA PERSONA	JEFFREY GOLIN
IN PROPRIA PERSONA	ELSIE GOLIN

ROSE M. REUMMLER, CSR NO.9053
OFFICIAL REPORTER

SAN JOSE, CA.; OCTOBER 8, 2003; A.M. SESSION
DEPARTMENT 15 WILLIAM F. MARTIN, JUDGE
(Dr. Hector Cerezo, psychiatrist, on witness stand, direct examination by petitioner Mr. Golin)

...

(p. 10, starting at line 20)

MR. GOLIN: I will ask about side effects. My question was about the warnings and precautions against using this drug.

THE COURT: I thought it was contraindications.

BY MR. GOLIN:

Q. Contraindications.

A. Contraindications, of course, the *(11)* contraindications, if they don't have the indication for, like psychotic disorder or mania.

Q. Well, would it be advisable if you knew a patient had seizure conditions to give them Risperdal? Would that be – would that be safe?

A. That's not a contraindication for Risperdal.

Q. What would it be?

A. We prescribe patients who are taking antiseizure medications – there are people who have seizures and have psychotic symptoms, and we prescribe them Risperdal.

Q. You do?

A. Yes.

Q. You're not aware of any warnings or indications against using these psychiatric medications with people that have a seizure conditions?

A. The patient – I'm aware of that. It can lower seizure threshold.

Q. Lower seizure threshold, right. What would you interpret that to mean?

A. That it can precipitate seizures for people who are predisposed to have seizures.

...

(p. 15, lines 7-22)

Q: What would be the correct clinical response to the ap-

pearance of tardive dyskinesia in a patient that was taking psychiatric drugs? What would be the correct clinical response?

A: Correct clinical response?

...THE COURT: What would you do if you had a patient taking a medication and you saw tardive dyskinesia?

THE WITNESS: You have to discontinue the medicine

BY MR. GOLIN:

Q: How do you discontinue it?

A: You gradually taper it down.

Q: You taper it down?

A: Yes. Slowly. And then with our current medical knowledge, we give them a replacement of Vitamin E....

Q: Thank you very much...

(p. 17, lines 13-28):

Q. If a person were exhibiting signs, what would the signs of neuroleptic malignant syndrome be?"

A: The first signs, the patient becomes stiff.

Q: Stiff?

A: *Yes.*

Q: Moves like a zombie?

A: They become immobile.

Q: Freezing up?

A: Freezing up. And they start having a rise in temperature.

Q: And if you, what would be the correct clinical response to the appearance of neuroleptic malignant syndrome?

A: Emergency Hospitalization.

Q: Emergency Hospitalization. Would you continue to give the psychiatric medication if you saw those symptoms? (p. 18, lines 1-8)

A: No. Discontinue all medications.

Q: Discontinue all medications. What could happen if you failed to do this?

A: They could die.

Q: Could cause death?

A: (Witness nods head)

THE COURT: He's shaking his head, yes.

THE WITNESS: Yes....

(p. 60, lines 22-26):

Q:(Golin) You testified a minute ago that you taper off gradually. I'm not understanding something here.

A: If we have to stop the medication and doesn't (sic) plan to replace it with another medication, we have to taper it off....

...

(p. 76, line 14, to p. 79, line 12)

THE COURT:...Exhibit 22, could I see that for a second. Are you offering this into evidence?

MS. STREET: I am, your Honor.

THE COURT: Now is the time to talk about Exhibit 22. This is the Alta Bates November 7, 2002, records that have been subpoenaed to the Court under seal and we've opened them here and marked them.

MR. GOLIN: Your Honor, I guess maybe I'm going to argue about this one. The doctor that evaluated Nancy –

THE COURT: Do you want them in evidence or not? That's the motion.

MR. GOLIN: I don't think they should be in evidence, your Honor.

THE COURT: The reason?

MR. GOLIN: Because it contains testimony from a person – from a non-expert in this medical field. He is not a person who is qualified to be an expert witness in neurology or psychiatry.

THE COURT: Mrs. Golin, stand up.

MS. GOLIN: Okay. Or he was busier than a one-armed paper hanger dealing with a dislocated shoulder, getting that back into place and [validating] a broken collar bone and treating her for pneumonia. He was also, you know – that wasn't his primary thing while she was up there.

THE COURT: What I'm hearing you say – I'm going to repeat that back – is your objection to the introduction of these medical records from Alta Bates Hospital dated November 7, 2002, is that the doctor who did the exam is not – is not qualified to render opinion that are reflected in the

report.

MR. GOLIN: Right. Unqualified testimony, your Honor.

THE COURT: The response?

MS. STREET: Your Honor, in this matter, these records are material and relevant. This is a medical doctor, an ER doctor that's a licensed medical professional. They are relevant and material. Dr. Cerezo called on these documents as to the allegation of tardive dyskinesia, the presentation of the proposed conservatee on this date. They're material, relevant indeed. There was testimony from the Golins' witness, Dr. Kaplan, yesterday, from review of these records he was familiar with the November 7, 2002, records, and I believe they should be admitted.

MR. GOLIN: I disagree, your Honor. Dr. Kaplan did not testify that he was present or at any interaction at the time of the November 7 examination. He said he only reviewed them later. If she says Dr. Cerezo called upon this evidence, then I think that means that part of Dr. Cerezo's testimony is in error.

MS. GOLIN: What he was relying on were the radiology – radiological reports, not this.

THE COURT: Have a seat, folks. Mr. Stiles had his hand up. Go ahead, sir.

MR. STILES: Your Honor, I'd like to point out to the Court that their own expert witness testified to the effect that any licensed medical professional could make the observations that were made by this doctor.

MS. GOLIN: Your Honor, this was not our medical expert. This was their medical expert. This is the person that San Andreas Regional Center had Nancy taken to for drugging. This was not our expert. This is our witness. We subpoenaed him as a witness. We don't think he's –

THE COURT: You're mistaken Mr. Stiles is referring to Dr. Kaplan, your witness yesterday afternoon.

MS. GOLIN: But he didn't refer –

THE COURT: Let's rule on this, folks. The objection is not a legal objection. It's really argument as to the weight of the evidence. And I'll consider this argument as to the weight, number one. I will admit Exhibit 22 for several reasons.

First of all, they're authenticated by the custodian of records and they look like business records. Number two, they were relied on by Dr. Cerezo today, who is the Golin's witness, but also by Dr. Kaplan yesterday. He did refer to having read these as well as looking at the x-ray films. So with respect, I think both of the expert witnesses brought in by the Golins looked at these records. And in terms of relevance, of course they're relevant. They show whether Nancy did or did not have side effects on November 7.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
DEPARTMENT 15 WILLIAM F. MARTIN, JUDGE

IN RE: CONSERVATORSHIP OF NANCY GOLIN

CASE NO.:
1-02-PR-151096
SAN JOSE, CA.;
OCTOBER 7-2003;
P.M. SESSION

REPORTER'S TRANSCRIPT
OF
TESTIMONY AND PROCEEDINGS

APPEARANCES:

FOR NANCY GOLIN:	OFFICE OF THE PUBLIC DEFENDER BY: MALORIE STREET, D.P.D.
FOR DEPARTMENT OF DEVELOPMENTAL SERVICES	STATE OF CALIFORNIA BY: H. DEAN STILES SENIOR STAFF COUNSEL
FOR SAN ANDREAS REGIONAL CENTER	BERLINER-COHEN BY: NANCY J. JOHNSON ATTORNEY AT LAW
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SAN JOSE, CA.; OCTOBER 7, 2003; P.M. SESSION
DEPARTMENT 15 WILLIAM F. MARTIN, JUDGE

(Dr. Jerold Z. Kaplan, chief of surgery, expert in orthopedics and abuse, Alta Bates Hospital (Berkeley), on witness stand, direct examination by petitioner Mr. Golin).

(p. 107, starting at line 18)
Q: Could you please describe your interactions with myself and Elsie?
A. There's been extensive interaction with you and Elsie and me. The Golins are extremely questioning, would be the term that I would use. They do a lot of research on their own. They'll check the Internet, check books, ask an awful lot of questions. And you need to send a moderate amount of time with them, but I have always interpreted it as very concerned parents as opposed to – it's not – it's not been a negative interaction. It's been a lot of time. Spent more time with them than with *(108)* the average patient and probably with most of my patients' parents or family. But not what I would call an inordinate amount. I have a patient in the hospital today that has – actually has a wife and an ex-wife who are present and both help take care of him. Again, spend a large amount of time with them.

There are certain – they check things on the Internet, they look at books, bring things to me. They want to know, can we do that? Have you thought about this? Again, I think it's just that they're very concerned about this as parents.

Q. Have you ever observed us to facilitate the care for Nancy Golin, and if so, could you please describe your observations?

A. Yes, Particularly when Nancy's been hospitalized, particularly the one that just stands out in my mind is when she was hospitalized with a wound on the foot, its similar to the old comment about real estate. Location, location, location. The most important things are elevation, elevation and elevation, which means you need to stay in bed if you're in the hospital, foot elevated. Nancy is a wanderer. She will get up and meander. As a matter of fact, she did it

there. That's Nancy. She likes to wander. And you can't explain to Nancy they way you could to a normal individual, Look, it's very important. You need to stay in bed for a few days and keep your foot up. Nancy will get up, she will try to get up.

And when she had her surgery, Elsie sat by her side literally for about five days talking to her, singing to her, stroking her hair, stroking her hand and kept Nancy in bed. That was literally any time, day or night, depending on what else was going on. Sometimes early in the morning. Didn't matter when I was there, so was Elsie.

...

(page 122, starting at line 25)
BY MR. GOLIN:
Q. The question is: Are you familiar, just familiar, with Nancy's antiseizure medication history?
A. Yes, I am. Nancy has had a complex problem with seizures. I definitely would not be the person that would be the best qualified to maintain her antiseizure medication. However, from the records, and particularly from my experience with Nancy as a patient, she responds actually best to Phenobarbital. She has been – which is one of the old drugs for seizure medication. One of the old reliable standbys. She has been at times changed to other medications, other medications have been added, and in general, the physicians – from my review of her records at various times that she's been hospitalized, physicians have ended up going back to the basic Phenobarb which seems to control her the best.

...

(starting at p 124, line 1)
Q: Have you had an opportunity to observe us as Nancy's parents that would make it possible for you to form a personal opinion about us as Nancy's conservators?
A. I think so.
Q. And what would that opinion be?
A. In my experience and interaction, I have seen nothing that would concern me as far as Nancy being under the conservatorship of her parents.

Q. Dr. Kaplan, what is your usual charge for serving as an expert medical witness?
A. $2,500 per half day.
Q. And what are you being paid for your appearance here today?
A. Nothing.
Q. Then why are you here?
A. Because in this instance, I truly feel that Jeff and Nancy (sic.) do have Nancy's best interest at heart.
THE COURT: You mean Elsie?
THE WITNESS: Elsie. Excuse me, yes. That Jeff and Elsie do have Nancy's best interest at heart. Their interaction with me has certainly been such that I would have no hesitancy or concern in their being the prime conservators. I have been involved in numerous cases of abuse, child abuse, and elder abuse. Served as an expert on both sides, both at times for the state, at times for individuals. It's an area of interest to me, abuse. And I truly do not believe that this is the case at this time, and therefore when Jeff asked if I would testify and also indicated that they didn't have the funds at the present time to pay, I said I would be here.